NO. 77-1718

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

MAJID TAERGHODSI and
NEZAM YOUSEFI,

Petitioners.

v.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement of Facts	4
Reasons for Granting This Writ . .	9
1. Where the Government Failed To Fully Comply With Operating Instruction 214.2(f)(7) It is Estopped From Deporting the Petitioner	9
2. The Selective and Discriminatory Enforcement of the Immigration Laws Has Been Banned by This Court's Holding in Yick Wo v Hopkins	12
3. The Immigration Judge Reversibly Erred By Denying Petitioner's Motion to Suppress	14
Conclusion	15
Appendices	
A - Opinion of Board of Immigration Appeals - Nezam Yousefi	A-1
Opinion of Board of Immigration Appeals - Majid Taerghodsi	A-9

B - Judgment of Court of Appeals - Majid Taerghodsi. B-1
Judgment of Court of Appeals - Nezam Yousefi B-3

C - Order of Court of Appeals Granting Further Stay Of Mandate - Majid Taerghodsi C-1
Order of Court of Appeals Granting Further Stay Of Mandate - Nezam Yousefi C-3

CITATIONS

Cases:

Accardi v. Shanghnessy, 347 U.S. 260 (1954) 12

Dixon v. District of Columbia, 394 F.2d 966 (U.S.App.D.C. 1968). .13

Falk v. United States, 479 F.2d 616 (CA7 1973). 13

Lennon v. United States, 527 F.2d 187 (CA2 1975). 14

Navis-Duran v. I.N.S., 569 F.2d 809 (CA1 1977). 15

Noel v. Chapman, 508 F.2d 1023 (CA2 1974) cert. den. 423 U.S. 824 (1975). 11

Oyler v. Boles, 368 U.S. 448 (1962). 13

U.S. ex rel. Parco v. Morris, 426 F.Supp. (E.D.Pa. 1977). .10,11

U.S. v. Steele, 461 F.2d 1148 (CA8 1972). 13

Yick Wo v. Hopkins, 118 U.S. 356 (1886). 12

Miscellaneous:

I.N.S. Operating Instruction 214.2(f)(7). 8, 9, 10,11

NO. _____

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IMMIGRATION AND NATURALIZATION
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Petitioners, MAJID TAERGHODSI and NEZAM YOUSEFI, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit summarily affirming the opinion and judgment of the Board of Immigration Appeals. The judgment of the

Court of Appeals was rendered on February 28, 1978.

The appeals of Petitioners, reviewed separately by the Court of Appeals, are here consolidated for the purposes of judicial economy in that common questions of fact and law are presented.

OPINIONS BELOW

The opinion of the Board of Immigration Appeals, as yet unreported, appears at Appendix A, infra, pp.A-1. The Court of Appeals affirmed the judgment of the Board of Immigration Appeals without opinion. See Appendix B, infra, pp.B-1.

JURISDICTION

On May 1, 1978, the Court of Appeals granted Petitioners' Motion for Further Stay of Issuance of Mandate to Allow Petitioners the opportunity to file their

application for writ of certiorari with this Court not later than May 31, 1978. See Appendix C, infra, pp.C-1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

QUESTIONS PRESENTED

Petitioners appealed orders of the Immigration and Naturalization Service District Director finding them deportable. The questions presented for review are:

1. Whether the Government may be estopped from deporting an alien student because the Immigration and Naturalization Service has constructively rescinded one of its own "Operating Instructions" by failing to fully comply with its mandates.

2. Whether the Government may selectively enforce the immigration laws

of the United States by discriminatorily deporting those aliens who espouse unpopular political views.

3. Whether Petitioner TAERGHODSI was denied due process of law by the Immigration Judge's denial of his motion to suppress certain evidence.

STATEMENT OF FACTS

The facts relevant to the questions presented by this Petition are uncontroverted and therefore will be introduced to the Court in summary fashion.

On May 1, 1976, Petitioners participated in a lawful assembly protesting against the Shah of Iran and United States involvement in Iran. The demonstration took place in a public park in Houston, Texas. Officers of the Houston Police Department ordered the demonstrators to disperse. Petitioners complied

with this order and proceeded to attempt to leave the site of the demonstration.

As Petitioners attempted to leave, the automobile in which they were passengers was stopped by Houston Police officers. Petitioners were asked to produce their passports and visas, however, were unable to do so although they did present valid driver licenses and university identification cards. Petitioners were then transported to the city of Houston Jail and detained for further investigation by the Immigration and Naturalization Service. Petitioners were transferred to the custody of the Immigration and Naturalization Service the following day.

An agent for the Service interrogated Petitioners concerning nationality and immigration status. Immigration Form I-213 was then completed for both

Petitioners by the Service. It was during this investigation that the Service discovered the following facts:

1. That Petitioner YOUSEFI had been granted an extension of temporary stay until April 19, 1976, and;

2. That the personal effects of Petitioner TAERGHODSI, taken from him by the Houston Police Department and subsequently transferred to the Service, contained an employee identification card.

It was then determined by the Service investigators that Petitioner YOUSEFI was out of lawful immigration status by virtue of the fact that he was a technical "overstay" and that Petitioner TAERGHODSI had not been authorized by the Service to accept employment while in the United States. Upon advice of counsel, Petitioners refused to give

a sworn statement to Service investigators during the completion of their report on Petitioners.

The reports of the Service investigators, Petitioner TAERGHODSI's employee identification card, and certain other Service documents and the oral testimony of the Petitioners were subsequently admitted into evidence, over objection of counsel, at Petitioners' deportation hearing.

On December 9, 1976, the Immigration Judge held that all evidence taken in the hearing was admissible and further found Petitioners deportable on the grounds charged.

Appeals were taken by Petitioners to the Board of Immigration Appeals. The Board affirmed the findings and conclusions of the Immigration Judge. Peti-

tioners then sought review in the United States Court of Appeals for the Fifth Circuit.

By per curiam opinion the Court of Appeals affirmed the opinion and judgment of the Board of Immigration Appeals in Petitioner YOUSEFI's case on February 28, 1978, and in Petitioner TAERGHODSI's case on March 2, 1978.

At Petitioners' deportation hearings testimony was elicited which tended to show that:

1. Operating Instruction 214.2(f)(7) had not been fully complied with by the Service;

2. Notations made by Service agents concerning the political activities of Petitioners had been made on their records, and;

3. No probable cause existed for

Petitioners' arrest and, hence, items seized from them were tainted.

REASONS FOR GRANTING THIS WRIT

1. WHERE THE GOVERNMENT FAILED TO FULLY COMPLY WITH OPERATING INSTRUCTION 214.2(f)(7) IT IS ESTOPPED FROM DEPORTING THE PETITIONER.

In relevant part, Operating Instruction 214.2(f)(7) states that Officers of the Service shall "meet with foreign students...and with foreign student advisors...to assure that these students and advisors have maximum understanding of the law, regulations and procedures governing non-immigrant student." O.I. 214.2(f)(7).

Deportation proceedings were initiated against Petitioner YOUSEFI on the charge that he had "remained in the United States for a longer time than admitted" in violation of Section 241(a)(2) of the Immigration and Nationality Act.

Petitioner contends that O.I. 214.2(f)(7) places an affirmative duty on the Service and failure to fully comply with its mandates precludes the Government from now deporting him.

Petitioners rely on United States ex rel. Parco v. Morris, 426 F.Supp. 976 (E.D.Pa. 1977). The Parco court ruled that the Service's failure to publish the rescission of an Operating Instruction created an estoppel against the Government in favor of the alien. Petitioners here contend that whether the Service formally rescinds an Operating Instruction, as in Parco, supra, or simply fails to implement its mandates thereby constructively rescinding the O.I., as in the instant case, makes no difference. The same result of government estoppel is required in both

situations.

The Parco court distinguished Parco from the situation found in Noel v. Chapman, 508 F.2d 1023 (CA2 1974), cert. denied 423 U.S. 824 (1975), where the Second Circuit focused specifically on the discretionary nature of voluntary departure. The distinction is one of procedure rather than substance. In the instant case, the central issue is clearly one of procedure. Petitioners contend that the procedures utilized by the Service to constructively rescind O.I. 214.2(f)(7) are unlawful under Parco, supra. Without notice of the rescission to the alien, the Service is now estopped to deport him.

Further, Petitioners would urge this Court to take into account compelling policy arguments for the retention of

O.I. 214.2(f)(7). The record below is replete with examples of the Petitioners' difficulty with the English language and resultant misconceptions concerning the requirements of the Immigration and Nationality Act.

Petitioners' contention is further bolstered by this Court's ruling in Accardi v. Shanghnessy, 347 U.S. 260 (1954) where the Court reiterated its belief that compliance with Service regulations was an essential safeguard to the alien's rights. The Accardi Court found that failure to follow a Service regulation required reversal of an otherwise valid deportation order.

2. THE SELECTIVE AND DISCRIMINATORY ENFORCEMENT OF THE IMMIGRATION LAWS HAS BEEN BANNED BY THIS COURT'S HOLDING IN YICK WO V. HOPKINS

In Yick Wo v. Hopkins, 118 U.S. 356

(1886), this Court announced its ban of the selective or discriminatory enforcement of the law. It is precisely the unequal application of a law, fair and impartial on its face, that Petitioners challenge here. While conscious selectivity is not, in and of itself banned, selectivity based on some unjustifiable standard or other arbitrary classification has been found to be repugnant to the Fourteenth Amendment to the Constitution of the United States. Oyler v. Boles, 368 U.S. 448 (1962).

It is now beyond cavil that political activity or association is within the boundaries of the constitutional meaning of "unjustifiable standard." Falk v. United States, 479 F.2d 616 (CA7 1973); United Stated v. Steele, 461 F.2d 1148 (1972); Dixon v. District

of Columbia, 394 F.2d 966 (U.S.App.D.C. 1968).

A reading of the record below will indicate, Petitioners believe, the selective and discriminatory nature of their deportation proceedings. The use of deportation to stifle dissent or to rid our country of those people who hold political views unpopular with the Government cannot be condoned and it is respectfully urged that this Court follow the dictates of Lennon v. United States, 527 F.2d 187 (CA2 1975).

3. THE IMMIGRATION JUDGE REVERSIBLY ERRED BY DENYING PETITIONER'S MOTION TO SUPPRESS

Petitioners were arrested without warrant and without probable cause. Statements and tangible evidence seized from them are, therefore, inadmissible and may not be used as a basis for finding deportability.

Petitioners rely primarily on the recent case of Navia-Duran v. Immigration and Naturalization Serv., 569 F.2d 809 (CA1 1977). Petitioner TAERGHODSI's employee identification card, clearly a "fruit of the poisonness tree" cannot be used as evidence, nor can his subsequent statements given over objection of counsel. Id.

CONCLUSION

Petitioners urge that the Service is estopped from deporting them for failure to implement their own regulations, for selectively initiating deportation proceedings and for incorrectly admitting certain evidence.

Respectfully submitted,

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May 31, 1978

APPENDIX A

UNITED STATES DEPARTMENT
OF JUSTICE
BOARD OF IMMIGRATION APPEALS

FILE NO. A21 490 974

IN DEPORTATION PROCEEDINGS
APPEAL

CHARGE:

Order: Sec.241(a(2), I&N Act
(8 U.S.C. 1251(a)(2)-Non-
immigrant remained longer

In Re: NEZAM YOUSEFI

Application: Termination of Proceedings

July 19, 1977

In a decision dated December 7, 1976, the immigration judge found respondent deportable under section 241(a)(2) of the Immigration and Nationality Act, as a non-immigrant who had overstayed the term permitted him by the Service. The immigration judge granted the respondent voluntary departure in lieu of deportation. The respondent appeals, alleging that irregularities in his arrest and in the initiation of the proceedings by the Service mandate termination of these proceedings. Additionally, he alleges that the Government is estopped from deporting him on the stated charge,

since the Service has not complied with its own Operating Instructions, in that it has failed to adequately apprise foreign students in the Houston area of the requirement that they must file for an extension of stay at the expiration of their visas. The appeal will be dismissed.

The respondent, a native and citizen of Iran, entered the United States as a nonimmigrant student on April 20, 1974 authorized to remain until April 19, 1976. On May 1, 1976, the respondent was arrested by officers of the Houston Police in connection with his activities at a political demonstration. 1/ On May 2, he was released into the custody of Service officers. An Order to Show Cause was issued by the Service, charging the respondent with deportability under section 241(a)(2) of the Act, in that his authorized period of instruction in the United States had expired some 13 days before. On October 27, 1976, at one of several hearings conducted in connection with respondent's case, the respondent admitted all allegation contained in the Order to Show Cause. However, he denied deportability-alleging that he had been the victim of selective initiation of deportation proceedings by the Service, and that, by its alleged non-compliance with Service Operating Instructions §214.2(f)(7), the Service was estopped from effecting his deportation on the stated charge. The immigration judge found against the respondent on both of these arguments, and found him deportable under Section 214

(a)(2) of the Act.

I.

The respondent's case was heard by the immigration judge in a consolidated proceeding involving four other respondents. The allegations of facts contained in the five Orders to Show Cause were not identical. In Matter of Taerghodsi, Interim Decision _____(BIA June 28, 1977), involving an appeal from a finding of deportability steming from these same proceedings, we defined the standards which should govern the immigration judge's decision to consolidate or hear separately the cases of different respondents. As in that case, our review of the record satisfies us that the respondent in this case was afforded the opportunity to fully and clearly litigate his claims. In contrast with Matter of Taerghodsi, supra, the respondent and two co-respondents joined in several arguments to the immigration judge. Since the issues of fact in the respondent's particular case were not complex, the immigration judge was clearly justified in consolidating the proceedings of the respondent and the two co-respondents joining in the estoppel and selective initiation of deportation arguments. Such consolidation clearly promoted administrative efficiency without prejudicing the respondent's due process rights.

II.

On appeal, the respondent argues first that the finding of deportability

was based upon evidence illegally seized from him by the Houston Police. However, the record establishes that the respondent admitted the allegations contained in the Order to Show Cause at the hearing. It is settled that irregularities in the arrest and interrogation procedure will not preclude a valid finding of deportability if that finding is based upon evidence unrelated to the allegedly illegal activity. U.S. ex rel. Bilokumsky v. Todd, 263 U.S. 149 (1923); Avila-Gallegos v. INS, 525 F.2d 666 (CA2 1975). Since the respondent admitted the allegations in the Order to Show Cause, and since these allegations, once admitted, are sufficient to establish deportability under section 241(a)(2), the respondents claim is without merit.

III.

The respondent next argues that the Government is estopped from deporting him because Service officers in the Houston area have not complied with Service Operating Instructions section 214.2(f)(7). This instruction states that officers of the Service shall "meet with foreign students...within their jurisdiction and with foreign student advisors...to assure that these students and their advisors have maximum understanding of the law, regulations, and procedures governing non-immigrant students."

The respondent alleges that at no time during his status as a nonimmigrant did Service officers meet with him or other nonimmigrant students to carry out this directive. However, the Foreign

Student Advisor employed by the respondent's institution testified at the hearing that Service officers met with foreign student advisors at regular intervals in connection with immigration law and procedure. Even if noncompliance with OI 214.2(f)(7) would preclude the initiation of deportation proceedings, the Service in this case has complied substantially with its terms.

Additionally, the directive contained in OI §214.2(f)(7) does not serve to cast upon the Service the burden of insuring that every student in its jurisdiction maintains his status properly. That burden rests ultimately upon the student himself. Form I-20A, issues to each prospective foreign students for his own records before his arrival in the United States, states clearly:

"A nonimmigrant student is permitted to remain in the United States only while maintaining non-immigrant student status, and in any event not longer than the period fixed at time of admission... unless he applies to the Immigration and Naturalization Service on Form I-538 in accordance with the instructions on that form between 15 and 30 days prior to the expiration of the period of his authorized stay and obtains an extension of his stay."

Form I-538, filed by the respondent on April 28, 1975, contains a similar notification. The Service cannot be held to bear the responsibility for the res-

pondent's disregard of Service requirements of which he was on full notice. We find that the respondent has not established the sort of detrimental reliance necessary to estop the Government. Cf. Matter of Lavoie, 349 F.Supp. 68 (D.V.I. 1972; Gesturo v. District Director, INS, 337 F.Supp. 1093 (C.D. Cal. 1971).

IV.

The respondent finally argues that he has been singled out for the initiation of deportation proceedings solely because of his political beliefs. The record reveals that a Form G-600A "Control Card" was attached to the respondent's file after he had been remanded to Service custody on May 2, 1976. This card bears the notation "Iranian Students Association." At the hearing, a Service investigator, when questioned as to the possible relevance of this notation in a case involving a student overstay, stated that this notation indicated "a certain type of case, the real type of case...." The respondent argues that this statement reveals the true reason for his deportation.

The initiation of deportation proceedings against an alien whom the District Director has cause to believe is deportable is a matter within the discretion of the District Director. While the respondent is undoubtedly correct in stating that this discretion may not be abused by the District Director, there is nothing in the record that the respondent

has pointed us to which would sustain the heavy burden of showing an abuse of discretion by the District Director in this case. The investigator's statement, without more, is clearly insufficient to establish that there has been any abuse of discretion. It is ambiguous and the respondent has furnished us with no evidence which would tend to substantiate his charge that this statement should be read to indicate a desire to effect his deportation solely because of his political beliefs.

Since we find that the respondent's deportability has been established upon clear, convincing, and unequivocal evidence, we shall dismiss the appeal. Because the term of voluntary departure granted the respondent by the immigration judge has expired, we shall grant the respondent 30 days in which to depart from the United States voluntarily. See Matter of Choularis, Interim Decision_____(BIA March 29, 1977).

ORDER: The appeal is dismissed.

FURTHER ORDER: The respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Chairman

1/ No evidence of prosecution on this charge appears in the record.

UNITED STATES DEPARTMENT
OF JUSTICE
BOARD OF IMMIGRATION APPEALS

FILE NO. A21 369 456

IN DEPORTATION PROCEEDINGS
APPEAL

CHARGE:

Order: Sec. 241(a)(9), I&N Act (8U.S.C. 1251(a)(9))-Nonimmigrant, failed to maintain status

In Re: MAJID TAERGHODSI

Application: Termination

June 28, 1977

In a decision dated December 9, 1976, the immigration judge found the respondent deportable under section 241(a)(9) of the Immigration and Nationality Act on the ground that he had failed to maintain his nonimmigrant student status. The respondent was granted voluntary departure in lieu of deportation. The respondent appeals from the finding of deportability, arguing that it was based on evidence unlawfully seized and which should have been excluded from consideration at the hearing. The appeal will be dismissed.

The respondent, a native and citizen of Iran, was admitted to the United States as a nonimmigrant student on December 31, 1970. On May 1, 1976, he

was arrested by the Houston police in the aftermath of a political demonstration, apparently on the charge of obstructing traffic. 1/ After transportation to the station house for booking, the respondent's personal effects were confiscated. Upon ascertaining that the respondent was an alien and that he was unable to verify his alien status, the Immigration and Naturalization Service was notified.

On May 2, 1976, the respondent was remanded to the custody of Service officers. His personal effects, confiscated at the time of his incarceration were also turned over to the Service officers. Among these effects was a document issued by the Marriott Corporation, bearing the respondent's name, and relating his participation in an "Employee Health and Welfare Benefits Plan" administered by that corporation.

An Order to Show Cause was issued by the Service on May 3, 1976, charging the respondent with deportability under section 241(a)(9) of the Act. Specifically, it was alleged that the respondent had violated his nonimmigrant status by accepting employment without the advance permission of the Service, as required by 8 C.F.R. 214.2(f)(6).

Hearings were held before the immigration judge on June 16, October 17, and November 15, 1976. At these hearings, the respondent's case was heard in conjunction with the cases of four other aliens, all of whom had been arrested at

May 1st political demonstration. 2/ The five respondents were represented by the same counsel. The immigration judge denied the motion to suppress the identification card signed by the Houston police. He relied upon this card and statements made by the respondent at the hearing to find the respondent deportable under section 241(a)(9) by clear, convincing, and unequivocal evidence.

I.

We are faced at the outset with some question as to the procedure employed by the immigration judge in this case. The respondent's case was heard during three different hearings, interspersed with the cases of four other respondents charged with deportability on unrelated grounds. 3/ However, after two preliminary motions, made in conjunction with two or more of the other respondents 4/, were denied by the immigration judge, all nexus between the respondent's case and the cases of the other four respondents dissolved. 5/ The respondent's case was nevertheless not severed from those of the other four respondents. We feel that it is appropriate at this time to discuss the considerations which should govern the immigration judge's decision whether to consolidate or hear separately the cases of different alien respondents.

Section 242(b) of the Immigration and Nationality Act grants wide latitude to the Attorney General to determine the

nature of deportation proceedings, mandating only that certain procedures essential to procedural due process be followed by the immigration judge. See generally Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Shaughnessy v. United States, 345 U.S. 206 (1953).

The regulations issued by the Attorney General do not specifically address the issue of joinder or consolidation of proceedings. However, 8 C.F.R. 242.8(a) specifies that it is within the power of the immigration judge "to take any... action consistent with applicable provisions of law and regulation as may be appropriate to the disposition of the case." We interpret this provision to allow the immigration judge, subject to the requirements of procedural due process, to consolidate the cases of different respondents, if he deems such consolidation necessary to promote administrative efficiency. 6/

This interpretation of 8 C.F.R. 242.8(a) finds support in judicial decisions concerning the authority of a hearing officer to consolidate proceedings in other types of federal administrative proceedings. In Association of Massachusetts Consumers, Inc. v. U.S. Securities and Exchange Commission, 516 F.2d 711 (D.C. Cir. 1975), the court stated:

> No principle of administrative law is more firmly established than that of agency control over its own calendar...Consolidation...and similar questions are housekeeping

> details addressed to the discretion of the agency and, due process or statutory considerations aside, are no concern of the courts. 516 F.2d at 714.

See also City of San Antonio v. Civil Aeronautics Board, 374 F.2d 326 (D.C. Cir. 1967); Cella v. United States, 208 F.2d 783 (7 Cir. 1953), cert. denied 347 &.S. 1016 (1954); Davis, Administrative Law Treatise and Administrative Law for the Seventies, §8.12.

We conclude, therefore, that it is within the power of the immigration judge to consolidate proceedings, if such consolidation does not serve to deny the respondent the right to fully and clearly litigate his claims. Necessarily, then, each case in which there has been a consolidation must be considered on its own record, with scrutiny of the respondent's opportunity at the hearing to have his case clearly presented before the immigration judge. Cf. Williams v. United States, 416 F.2d 1064, 1068 (8Cir. 1969); Tillman v. United States, 406 F.2d 930, 934 (5 Cir. 1969).

Turning to the case before us on appeal, we find that once the jointly-made motions for suppression and discovery were denied by the immigration judge, all connection between the respondent's case and those of the other individuals at the hearing disappeared. At this point, severance of the respondent's case would have been the best

course of action, both in the interests of administrative efficiency and clarification of the record for appeal, and in the interests of insuring full and proper presentation and consideration of the respondent's case by the immigration judge.

However, after a review of the voluminous record, we find that the respondent was in fact afforded a full opportunity to litigate his case, and that the immigration judge's opinion clearly and accurately culls the essential facts and issues from the record. In this conclusion, we are influenced by the fact that the respondent's case presented relatively simple issues of law and fact. Thus, while consolidation of dissimilar cases is not to be encouraged, and care must always be taken to insure full protection of the respondent's due process right to a full and fair hearing, we find that the respondent was not prejudiced by the immigration judge's failure to sever in this case.

II.

The respondent argues on appeal that his motion to suppress was improperly denied by the immigration judge, and that we should therefore terminate proceedings on the ground that the finding of deportability rests exclusively upon evidence tainted by the allegedly unlawful arrest by the Houston police. For the reasons that follow, this claim is without merit.

In his motion to suppress, the respondent sought exclusion of the employee identification card seized from him by the Houston police incident to his May 1, 1976 arrest. He argued that this arrest was unlawful, and that evidence seized as a result thereof was therefore inadmissible against him in a subsequent deportation proceeding. The immigration judge denied the respondent's motion on the ground that evidence seized by a state police officer, even if incident to an illegal arrest, was nonetheless admissible in a federal deportation proceeding.

We need not address the argument that the immigration judge should have excluded this evidence from the hearing (but see United States v. Janis, 428 U.S. 433 (1976)) for we find that the respondent testified at the hearing to his unauthorized employment (Tr. p. 28, Hearing of June 16, 1976). 7/ It is settled that the mere fact of an illegal arrest is not fatal to the initiation of subsequent deportation proceedings. U.S. ex rel. Bilokumsky v. Tod, 263 U.S. 145 (1923); Avila-Gallegos v. INS, 525 F.2d 666 (2 Cir. 1975). Rather, when deportability can be established on the basis of evidence unrelated to the allegedly unlawful arrest, failure to grant a motion to suppress, even if the evidence was in fact seized unlawfully, does not constitute reversible error. Since the respondent admitted his past employment at the hearing, and since this admission by itself was sufficient to establish deportability under section 241(a)(9),

we find that deportability was established by clear, convincing, and unequivocal evidence not subject to any potential taint. We shall therefore dismiss the appeal.

ORDER: The appeal is dismissed.

FURTHER ORDER: The respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Cirector; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Chairman

1/ No evidence of prosecution on this charge appears in the record.

2/ A fourth hearing was held on February 17, 1977. However, the immigration judge had rendered his decision in the respondent's case on December 13, 1976, and this hearing did not concern him.

3/ One respondent was charged with failing to depart the United States after the expiration of his student visa. Two others were charged with transferring to another school without prior authorization from the Immigration and Naturalization Service. The case of a fifth respondent was severed from those of the other four when it became apparent to the immigration judge that he might be eligible for suspension of deportation under section 244(a)(1) of the Act.

4/ At the outset of the hearing, two motions were made involving the respondent. The first was a motion to suppress evidence seized incident to the allegedly unlawful arrest by the Houston police on May 1, 1976. This motion was made jointly by the respondent and two other respondents. The second was a motion, made jointly by all of the respondents, for discovery of all photographs, statements, and other evidence resulting from their May 1 incarceration.

5/ Three respondents, not including the respondent in this case, joined in a motion for discovery relating to the procedure employed by the Service to implement the directive contained in O.I. 214.2(f)(6). These same three respondents, again not including the respondent in this case, asserted an estoppel claim, alleging affirmative Government misconduct based upon this section. These three respondents also sought to establish that they had been the victims of selective "prosecution" by the Immigration and Naturalization Service solely on the basis of their political views. The respondent in this case joined in none of these last three legal maneuvers.

6/ We thus conclude that the joinder and consolidation rules applicable in federal civil and criminal judi-

cial proceedings do not strictly obtain in federal deportation proceedings. See Fed. Rules of Civil Procedure, Rules 19, 20, and 21; Fed. Rules of Criminal Procedure, Rule 8(b). However, the dual policies behind the particular rules adopted in federal civil and criminal proceedings, the promotion of administrative efficiency in a manner consistent with the safeguarding of the litigant's rights, must obviously serve as our guide in devising standards to govern consolidation in federal deportation proceedings. See Davis, Administrative Law Treatise, and Administrative Law for the Seventies, §8.12.

7/ The respondent initially asserted a right to refuse to testify under the Fifth Amendment to the United States Constitution. This claim was properly rejected by the immigration judge. A respondent may refuse to testify in a deportation proceeding on the basis of the Fifth Amendment only when a particular questions relates to activity which is potentially incriminating. See Chavez-Raya v. INS, 519 F.2d 397 (7 Cir. 1975). There is no criminal penalty which attaches to unauthorized employment in the United States. The respondent, therefore, had no valid basis for refusing to testify, and the admission of his testimony, when he chose to comply with the immigration judge's direction, is not subject to attack.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 77-2555

Summary Calendar*

MAJID TAERGHODSI,
Petitioner,

versus

IMMIGRATION & NATURALIZATION SERVICE,
Respondent.

Petition For Review of an Order of the Board of Immigration and Naturalization Service

March 2, 1978

Before GOLDBERG, AINSWORTH, and HILL, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21. 1/

*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431

F.2d 409, Part I.

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 77-2596

Summary Calendar*

NEZAM YOUSEFI,
Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition For Review of an Order of the Board of Immigration and Naturalization Service

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March 2, 1978

Before GOLDBERG, AINSWORTH, and HILL, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21. 1/

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*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX C

CLERK, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT
FILED MAY 1, 1978
EDWARD W. WADSWORTH, CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 77-2555

MAJID TAERGHODSI,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition for Review of An Order of the Immigration and Naturalization Service

ORDER:

The motion for a further stay of the issuance of the mandate is GRANTED to and including May 31, 1978, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the

Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Irving L. Goldberg
United States Circuit
Judge

CLERK, U.S. COURT OF
APPEALS FOR THE FIFTH
CIRCUIT
FILED MAY 1, 1978
EDWARD W. WADSWORTH,
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 77-2596

NEZAM YOUSEFI,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

On Petition for Review of An Order of
the Immigration and Naturalization
Service

ORDER:

The motion for a further stay of the issuance of the mandate is GRANTED to and including May 31, 1978, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period

above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Irving L. Goldberg
United States Circuit
Judge

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

MAJID TAERGHODSI and
NEZAM YOUSEFI,
Petitioners,

v.

IMMIGRATION AND NATURALIZATION
SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I, JAMES REIF, counsel for Majid Taerghodsi and Nezam Yousefi, Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 30th day of May, 1978, I served copies of the foregoing Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C. 20530.

2. On the Immigration and Naturalization Service, Respondent, by mailing three copies in a duly addressed envelope, with air mail postage prepaid, to its attorneys of record, Philip Wilens, Chief, Government Regulations and Labor Section, Criminal Division, Washington, D.C. 20530; James P. Morris, Attorney, Department of Justice, Washington, D.C. 20530; and, Rex Young, Attorney, Department of Justice, Washington, D.C. 20530

JAMES REIF
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308 Livingston
Brooklyn, New York
212-858-9131

No. 77-1713

In the Supreme Court of the United States

OCTOBER TERM, 1978

MAJID TAERGHODSI AND NEZAM YOUSEFI, PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

WILLIAM OTIS,
MICHAEL J. KEANE,
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Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	12

CITATIONS

Cases:

Adickes v. *S. H. Kress & Co.*, 398 U.S. 144	6
Chavez-Raya v. *Immigration and Naturalization Service*, 519 F.2d 397	12
Cuevas-Ortega v. *Immigration and Naturalization Service*, C.A. 9, No. 77-1630, decided May 3, 1978	11
David v. *Immigration and Naturalization Service*, 548 F.2d 219	8-9
Gestuvo v. *District Director of U.S. Immigration and Naturalization Service*, 337 F.Supp. 1093	8
Harisiades v. *Shaughnessy*, 342 U.S. 580	5
LaVoie, In re Petition of, 349 F.Supp. 68	8
Michigan v. *Tucker*, 417 U.S. 433	11
Navia-Duran v. *Immigration and Naturalization Service*, 568 F.2d 803	11
Ojeda-Vinales v. *Immigration and Naturalization Service*, 523 F.2d 286	9
Toledo Scale Co. v. *Computing Scale Co.*, 261 U.S. 399	5

Cases—Continued — Page

United States v. *Ceccolini*, No. 76-1151, decided March 21, 1978 — 11
United States v. *Janis*, 428 U.S. 433 — 10
United States v. *Lovasco*, 431 U.S. 783 — 6
United States ex rel. Parco v. *Morris*, 426 F.Supp. 976 — 8
Woodby v. *Immigration and Naturalization Service*, 385 U.S. 276 — 5

Statutes and regulation:

Immigration and Nationality Act, 66 Stat. 163, as amended, 8 U.S.C. 1101 *et seq.*:

Section 241(a)(1), 8 U.S.C. 1251(a)(1) — 11
Section 241(a)(2), 8 U.S.C. 1251(a)(2) — 4
Section 241(a)(9), 8 U.S.C. 1251(a)(9) — 4

5 U.S.C. 552(a)(1) — 8
28 U.S.C. 2101(c) — 5
8 C.F.R. 214.2(f)(6) — 8

Miscellaneous:

1 C. Gordon and H. Rosenfield, *Immigration Law and Procedure* (Rev. ed. 1977) — 8

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The orders of the court of appeals (Pet. App. B-1 to B-4) are not reported. The opinions of the Board of Immigration Appeals (Pet. App. A-1 to A-18) are not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on February 28, 1978 (petitioner Yousefi)[1] and on March 2, 1978 (petitioner Taerghodsi). The petition

[1] The court of appeals order reprinted at Pet. App. B-3 to B-4 appears to have been misdated March 2, 1978. Petitioner refers to the correct date in the body of his petition (Pet. 2, 8).

for a writ of certiorari was filed on May 31, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government is estopped from deporting petitioners if it failed to comply with an internal regulation regarding periodic meetings with foreign students by officers of the Immigration and Naturalization Service.

2. Whether petitioners were victims of discriminatory enforcement of the immigration laws based on their political associations.

3. Whether the evidence seized from petitioner Taerghodsi at the time of his arrest and statements subsequently made by him were properly admitted at his deportation hearing.

STATEMENT

On May 1, 1976, petitioners, who are natives and citizens of Iran, were arrested by local police officers in Houston, Texas, apparently for a traffic violation committed after their participation in a political demonstration (Pet. App. A-9 to A-10; see Pet. App. A-2). Petitioners were asked to produce their passports and visas but were unable to do so (Pet. 5). Petitioners were transported to the police station and detained there for further investigation by the Immigration and Naturalization Service (INS). Petitioners' personal effects were confiscated at the police

station (Pet. App. A-10). Among petitioner Taerghodsi's personal effects was a card identifying him as an employee of the Marriott Corporation (Pet. App. A-10).

The day after the arrests, Thomas E. Wilson, a criminal investigator for the INS, visited the city jail as part of his regular duties (Tr. 74-76).[2] He questioned petitioners, who admitted that they were aliens, but who did not have any documentation showing their immigration status in their possession (Tr. 77, 86). Accordingly, petitioners were taken to the Immigration Office for further investigation, and their personal effects were turned over to INS officers.

Thereafter an order to show cause was issued charging that petitioner Yousefi had remained in the United States beyond the date authorized in his student visa (April 19, 1976), in violation of 8 U.S.C. 1251(a)(2) (Pet. App. A-2). A second order to show cause was issued charging that petitioner Taerghodsi had been employed by the Marriott Corporation in Houston, Texas, in violation of the terms of his student visa and without authorization of the INS, and that he was therefore subject to deportation pursuant to 8 U.S.C. 1251(a)(9) (Pet. App. A-10). Petitioners' cases were jointly heard by an Immigration Judge on June 16, October 27, and November 15, 1976.

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[2] "Tr." refers to the transcript of the deportation hearings conducted on June 16, October 27, and November 15, 1976 (Pet. App. A-10). The consolidated hearing involved petitioners and three other aliens arrested with them (see Pet. App. A-3, A-11 to A-14).

At the deportation hearing, petitioner Yousefi admitted that he was a native and citizen of Iran, that he had entered this country as a non-immigrant student, that he had previously applied for and received an extension of his visa until April 19, 1976, and that he had not applied for permission to stay beyond that date (Tr. 9-10, 15; Exh. 1). On December 7, 1976, the Immigration Judge found that Yousefi was subject to deportation pursuant to Section 241(a)(2) of the Immigration and Nationality Act, 66 Stat. 204, as amended, 8 U.S.C. 1251(a)(2), because he had overstayed his visa (Pet. App. A-1). Yousefi was granted voluntary departure in lieu of deportation (*ibid.*).

At the same hearing, petitioner Taerghodsi admitted that he was a native and citizen of Iran admitted into the United States on a student visa in 1971, and that he had been employed by the Marriott Corporation without authorization from the INS to accept employment (Tr. 26-28). On December 9, 1976, the Immigration Judge found that he was subject to deportation pursuant to Section 241(a)(9) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(9), because he had failed to comply with the conditions of his admission into this country (Pet. App. A-9). Taerghodsi was also granted voluntary departure in lieu of deportation (*ibid.*).

The Board of Immigration Appeals dismissed petitioners' appeals (Pet. App. A-7, A-16), and the court of appeals summarily affirmed the Board's orders that petitioners be deported if they did not depart voluntarily (Pet. App. B-1 to B-4).

ARGUMENT

1. Petitioner Yousefi's petition for a writ of certiorari was filed out of time. The judgment of the court of appeals in his case was entered on February 28, 1978 (see p. 1 and n. 1, *supra*). It is well established that deportation proceedings are civil, not criminal, in nature. *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276, 285; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594-595. The time for filing a petition for certiorari was not extended, and accordingly the 90-day period provided by 28 U.S.C. 2101(c) for petitioning in civil cases expired on May 30, 1978.[3] The petition was filed on May 31, 1978. The time limit imposed by 28 U.S.C. 2101(c) is jurisdictional. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418. Accordingly, the petition should be denied with respect to petitioner Yousefi.

2. Two of the claims raised by petitioner Taerghodsi are not properly presented by him. Petitioner contends first (Pet. 9-12) that the government is estopped from deporting him because of its alleged failure to comply with an Operating Instruction concerning meetings by INS officials with foreign students; and second (Pet. 12-14), that he was the victim of selective prosecution because of his political activities. At the deportation hearing and on administrative appeal, however, Taerghodsi did not join the aliens who raised these contentions (Pet. App. A-17

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[3] May 29, 1978 was a legal holiday.

n. 5). Nor did Taerghodsi raise these points in the court of appeals. Accordingly, it is unnecessary for this Court to review these claims by petitioner Taerghodsi. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n. 7; *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2. In any event, the claims are without merit.

(a) Petitioner contends (Pet. 9-12) that the government is estopped from deporting him because it failed to comply with Operating Instruction 214.2 (f) (7), which provides that officers of the INS shall meet with foreign students and their advisors "at least once a year, where practicable * * *," in order "to assure that these students and their advisors have maximum understanding of law, regulations, and procedures governing nonimmigrant students * * *."[4]

[4] The instruction reads, in relevant part:

> To establish and promote a more meaningful relationship between the Service and foreign students and to assure that these students and their advisors have maximum understanding of law, regulations, and procedures governing nonimmigrant students, district directors, and other officers of field offices shall meet with the foreign students of colleges and universities within their jurisdiction and with foreign student advisors. These meetings should be held at least once a year, where practicable, preferably at the beginning of the scholastic year. The Service officers should discuss with and explain to the foreign students, in a friendly, cordial, and sociable atmosphere conducive to promoting a mutual attitude of cooperation and assistance, their privileges and obligations as nonimmigrants and impress upon them the willingness of this Service to assist them with their immigration problems.

Petitioner claims that the instruction places an affirmative duty on the INS, that the Service failed to fulfill this duty, and that the government is therefore precluded from deporting him.

The evidence at the deportation hearing showed, however, that the INS had conducted meetings with foreign students and foreign-student advisors in the Houston areas "at least three times a year" during the three previous years (Tr. 140-141). These meetings usually involved a group of foreign-student advisors, but on occasion there were orientation sessions with the foreign students, including those at the university attended by petitioner Taerghodsi (Tr. 138). During these meetings, an INS officer explained various laws and regulations affecting the foreign students (Tr. 141). Accordingly, as the Board of Immigration Appeals found (Pet. App. A-5), "the Service in this case has complied substantially with [the instruction's] terms."

But even if the INS failed to comply with the instruction, Taerghodsi was not prejudiced. The purpose of the instruction is to assist foreign students in maintaining awareness of the laws and regulations governing their continued stay in this country. Taerghodsi does not contend that he was unaware of the requirement that he obtain authorization from the INS before he could accept employment.[5] He therefore has not established the detrimental reliance re-

[5] Petitioner Yousefi obtained an extension of his stay (Tr. 10), and therefore it is clear that he was aware that he was required to apply for such extensions.

quired to invoke an estoppel remedy. Cf. *In re Petition of LaVoie*, 349 F. Supp. 68, 72-75 (D. V.I.); *Gestuvo* v. *District Director of U.S. Immigration and Naturalization Service*, 337 F. Supp. 1093 (C.D. Cal.).[6]

(b) Nor is there merit to petitioner's claim (Pet. 12-14) that he was the victim of discriminatory enforcement of the law based on his political associations.

The decision whether to institute a deportation proceeding is within the discretion of the district director. Since petitioner's acceptance of employment without the prior approval of the INS violated the express terms of his admission to this country as a nonimmigrant student (see 8 C.F.R. 214.2(f)(6)), it constituted a proper ground for deportation, and one commonly invoked in similar circumstances. See 1 C. Gordon and H. Rosenfield, *Immigration Law and Procedure*, § 49, p. 4-86 (Rev. ed. 1977) and cases cited; *David* v. *Immigration and Naturalization*

[6] Petitioner's reliance (Pet. 10-11) on *United States ex rel. Parco* v. *Morris*, 426 F. Supp. 976 (E.D. Pa.), is misplaced. In *Parco* the INS issued a memorandum rescinding an Operating Instruction that would have authorized the grant of the plaintiffs' applications for extended voluntary departures. The rescission was not published in the Federal Register. The court found that the repeal of the instruction was a " 'general statement of policy' " required to be published in the Federal Register under 5 U.S.C. 552(a)(1), and therefore "a person without notice cannot be adversely affected." *United States ex rel. Parco* v. *Morris, supra*, 426 F. Supp. at 986. In this case, however, the INS did not formally rescind an instruction to the detriment of petitioner, nor did it implicitly rescind the instruction by noncompliance.

Service, 548 F.2d 219 (C.A. 8); *Ojeda-Vinales* v. *Immigration and Naturalization Service*, 523 F.2d 286 (C.A. 2).

Petitioner's contention that deportation proceedings were instituted in this case because of his political activity is based on evidence that is at most ambiguous. The INS control card attached to petitioner's file included the notation "Iranian Students Association" (Pet. App. A-6; Exh. 4). At the deportation hearing, an INS investigator, questioned about the significance of this notation, responded that "when the supervisor assigns a certain type of case, the real type of case, I'm not sure" (Tr. 86-87). He further stated, "I don't know why he has *Iranian Student Association*" (Tr. 87; emphasis in original). Accordingly, the Board of Immigration Appeals concluded (Pet. App. A-6 to A-7):

> [T]here is nothing in the record that the [petitioner[7]] has pointed us to which would sustain the heavy burden of showing an abuse of discretion by the District Director in this case. The investigator's statement, without more, is clearly insufficient to establish that there has been any abuse of discretion. It is ambiguous and the [petitioner] has furnished us with no evidence which would tend to substantiate his charge that this statement should be read to indicate a desire to effect his deportation solely because of his political beliefs.

[7] As noted above, petitioner Taerghodsi did not raise this claim before the Board; the Board's statement refers to petitioner Yousefi.

Finding that petitioner's deportability had been established by "clear, convincing, and unequivocal evidence" (Pet. App. A-7), the Board dismissed petitioner's[8] appeal. Since the Board's decision was supported by substantial evidence, the court of appeals correctly refused to disturb its finding.

3. Finally, Taerghodsi contends (Pet. 14-15) that inadmissible evidence was used as the basis for the finding of deportability. He argues that his arrest by Houston police was unlawful, and that tangible evidence seized incident to his arrest and statements he subsequently made to the immigration officers were therefore inadmissible. When petitioner was arrested, the police seized his personal effects, including his employee identification card; this card was later turned over to the immigration authorities and admitted into evidence at the deportation hearing. The Immigration Judge denied petitioner's motion to suppress without passing on the legality of petitioner's arrest, and the Board of Immigration Appeals affirmed (Pet. App. A-15).

Contrary to petitioner's contentions, even if evidence was unlawfully seized from him, that illegality would not render the evidence inadmissible in a federal deportation hearing. Deportation proceedings are civil in nature. See p. 5, *supra*. In *United States* v. *Janis*, 428 U.S. 433, this Court held that where—as here—the claim is that the evidence was unlawfully seized by state criminal enforcement offi-

[8] See note 7, *supra*.

cials, the likelihood that unlawful state police conduct would be deterred by exclusion of this evidence from federal civil proceedings is insufficient to warrant the application of an exclusionary rule. See *Cuevas-Ortega* v. *Immigration and Naturalization Service*, C.A. 9, No. 77-1630, decided May 3, 1978.

In any event, at the deportation hearing petitioner admitted his employment; as the Board of Immigration Appeals held (Pet. App. A-15), this evidence was sufficient, without reference to his employee card or other evidence seized at the time of his allegedly unlawful arrest,[9] to establish his deportability under 8 U.S.C. 1251(a)(1).

[9] Petitioner contends (Pet. 15) that his "subsequent statements given over objection of counsel" should also have been excluded, without identifying any particular statements. Since no statements made by petitioner prior to the deportation hearing were admitted into evidence, it appears that petitioner contends that his admissions during the deportation hearing were the "fruit" of his illegal arrest. However, any taint of the arrest, if unlawful, was superseded by petitioner's exercise of will in testifying at the hearing. See *United States* v. *Ceccolini*, No. 76-1151, decided March 21, 1978; cf. *Michigan* v. *Tucker*, 417 U.S. 433. This case is different from *Navia-Duran* v. *Immigration and Naturalization Service*, 568 F.2d 803 (C.A. 1), on which petitioner relies (Pet. 15), because that case involved the admissibility of an alien's statement made immediately following her arrest, while she was still in custody, which the alien contended were involuntary because of the circumstances of her interrogation and which were the sole evidence establishing deportability.

Petitioner also sought to invoke his privilege against self-incrimination to avoid testifying. The immigration judge properly concluded that petitioner could not invoke the privilege against self-incrimination, which may be raised by an alien in deportation proceedings only if his response would

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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AUGUST 1978.

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tend to implicate him in a crime. *Chavez-Raya* v. *Immigration and Naturalization Service*, 519 F.2d 397, 401 (C.A. 7). The alleged violation here—unauthorized employment—was not a criminal offense, nor did any of the questions asked of petitioner elicit incriminating responses.

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